

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA for the use of
WALTHAM LIME & CEMENT COMPANY,

Plaintiff,

v.

PEABODY CONSTRUCTION CO., INC.,
ODF CONTRACTING CO., INC.,
HOON COMPANIES, INC., and
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,

Defendants.

Civil Action
No. 05-10138 NG

APPLICATION FOR ORDER OF NOTICE

Plaintiff Waltham Lime & Cement Company ("Waltham Lime") respectfully requests that this Court issue an Order Of Notice with respect to Defendant ODF Contracting Co., Inc. ("ODF"), a bankrupt that is no longer in operation at its business address and cannot be located. A proposed Order Of Notice is attached hereto as Exhibit A. As grounds therefore, Waltham Lime states the following:

I. Factual Background

1. In this action, Waltham Lime is seeking damages under the Miller Act, 40 U.S.C. §§ 3131 - 3134, for failure to pay monies rightfully owed for materials supplied, in *quantum meruit*, and for false representations concerning the involvement of a federal agency in the subject project.

2. The Defendant, ODF Contracting Co. Inc. ("ODF"), is a Massachusetts corporation that has had a usual place of business at 60 Gerard Street, Boston, Suffolk County,

Massachusetts. ODF's sole officer and director, according to the latest filing with the Massachusetts Secretary Of State, is Oliver D. Fernandez, Jr. See Massachusetts Corporation Annual Report, October 6, 2001, attached hereto as Exhibit B.

3. On or about February 13, 2004, an Involuntary Petition was filed in the United States Bankruptcy Court for the District Of Massachusetts entitled In re ODF Contracting Co., Inc., Case No. 04-11125 WCH (Chapter 7-Involuntary) as to ODF by the Massachusetts Laborers' Health & Welfare Fund, the Massachusetts Laborers' Pension Fund, and the Massachusetts Laborers' Annuity Fund.

4. On July 1, 2004, Waltham Lime obtained an order granting it relief from the Automatic Stay as to ODF from the United States Bankruptcy Court for the District Of Massachusetts.

5. Waltham Lime filed the instant action on January 21, 2005.

6. On February 18, 2005, as shown by the documents attached hereto as Exhibit C, the originals of which have been previously filed with this Court, Deputy Sheriff Robert Foscaldo of Suffolk County made return that he was unable to serve either the offices or the officers, stockholders, agents, or attorneys of ODF within his precinct. It appears from the return that a security guard at 60 Gerard Street informed Mr. Foscaldo that ODF had been out of business for eighteen months and was no longer located at that address.

II. Argument

Under Federal Rule of Civil Procedure 4(h)(1), service on a domestic corporation may be made by delivering a copy of the process to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."

When a Massachusetts corporation cannot be located, Massachusetts law authorizes substitute service on the Massachusetts Secretary of State. If "an officer authorized to serve legal process makes a return on [process directed to a Massachusetts corporation] that, after diligent search, he can find no one upon whom he can lawfully make service . . . the court to which such process is returned may upon application issue an order of notice to such corporation, directing it to appear and answer within a designated period." Mass. G. L. c. 223 § 37.

Deputy Sheriff Robert Foscaldo has made such a return. He has attempted without success to serve the bankrupt ODF and its officers, directors, and shareholders at ODF's business address, and service has been returned to the Court showing this fact.

Should the requested Order Of Notice issue, Waltham Lime will deliver copies of it and the requisite papers to the office of the Massachusetts Secretary Of State, which will, after following the statutory procedures, provide this Court with a certificate of service. Such service is deemed sufficient service on a Massachusetts corporation. Mass. G.L. c. 223 § 37.

Accordingly, so that it may effectuate service on ODF, a bankrupt, Waltham Lime respectfully requests that this Court issue an Order of Notice, in the form attached hereto as Exhibit A.

Respectfully submitted,

WALTHAM LIME & CEMENT COMPANY

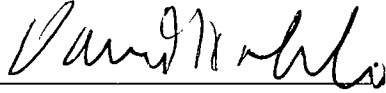
By its attorneys,


 Anthony M. Moccia – BBO#350225
 David B. Hobbie – BBO #637107
 ECKERT SEAMANS CHERIN & MELLOTT, LLC
 One International Place, 18th Flr.
 Boston, Massachusetts 02110
 Telephone: (617) 342.6800

DATED: March 21, 2005

Rule 7.1 Certification

I, David B. Hobbie, certify that the 16th day of March, 2005, I conferred with counsel for the defendants, Peabody Construction Co., Inc. and Hoon Companies, Inc., Sabatino F. Leo, Esq., and counsel for Travelers Casualty And Surety Company of America, Jonathan Burwood, Esq. concerning the within Application For Order Of Notice. Mr. Burwood has indicated that he does not oppose the Application For Order Of Notice.


David B. Hobbie

CERTIFICATE OF SERVICE

I, David B. Hobbie, hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail on March 21 2005, as follows:

Charles Plunkett, Esq.
Vena Riley Deptula, LLP
250 Summer Street
Boston, MA 02210
counsel for Peabody Construction Company, Inc., and Hoon Companies, Inc.

Jonathon Burwood, Esq.
Cetrulo & Capone
Two Seaport Lane
Boston, Massachusetts 02210
counsel for Travelers Casualty and Surety Company Of America


David B. Hobbie

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA for the use of
WALTHAM LIME & CEMENT COMPANY,

Plaintiff,

v.

PEABODY CONSTRUCTION CO., INC.,
ODF CONTRACTING CO., INC.,
HOON COMPANIES, INC., and
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA,

Defendants.

Civil Action
No. 05-10138 NG

ORDER OF NOTICE

The matter having come before this Court on the Application For An Order Of Notice of the Plaintiff, Waltham Lime & Cement Company, and this Court having been provided with return on process with respect to Defendant, ODF Contracting Co., Inc., indicating that, after diligent search, Mr. Robert Foscaldo, Deputy Sheriff of Suffolk County, can find no one within his precinct or at the business address of said Defendant upon whom he can lawfully make service of process, IT IS ORDERED that Defendant, ODF Contracting Co., Inc., is required to appear and answer in this action within thirty (30) days hereof.

A copy of the legal process directed to ODF Contracting Co., Inc. is attached hereto.

, Judge

Date:

"A"

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA for the use of
WALTHAM LIME & CEMENT COMPANY,

Plaintiff,

V.

PEABODY CONSTRUCTION CO., INC.,
ODF CONTRACTING CO., INC.,
HOON COMPANIES, INC., and
TRAVELERS CASUALTY AND SURETY
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ORDER OF NOTICE

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A copy of the legal process directed to ODF Contracting Co., Inc. is attached hereto.

, Judge

Date:

"B"



The Commonwealth of Massachusetts
William Francis Galvin
 Secretary of the Commonwealth
 One Ashburton Place, Boston, Massachusetts 02108-1512
 Telephone: (617) 727-9640

FEE: \$85.00

NOTE: PLEASE TYPE OR PRINT CLEARLY! INSTRUCTIONS ON OTHER SIDE.

MASSACHUSETTS CORPORATION ANNUAL REPORT

Federal Identification No. 04-2742932

1. The exact name of the corporation is: ODE Contracting Company Inc
2. Location of its principal office in Massachusetts: 60 Gerard Street
(number and street)
Boston Massachusetts 02119
(city or town) (state) (zip)

NOTE: If corporation is organized wholly to do business outside Massachusetts, state location of that office also:

- (number & street) (city or town) (state) (zip)
3. Name and address of the Resident Agent, if any: _____
(name) (number & street) (city or town) (zip)

4. Date of the end of the last fiscal year was: October 31 2001
(month) (day) (year)

5. Check here if the corporation stock is publicly traded: ☐ .

6. The capital stock of each class as of the end of its last fiscal year was:

CLASS OF STOCK	PAR VALUE PER SHARE STATE IF NO PAR	TOTAL AUTHORIZED BY ARTICLES OF ORGANIZATION OR AMENDMENTS		TOTAL ISSUED AND OUTSTANDING
		Number of Shares	Total Par Value	Number of Shares
COMMON:	NO PAR	5,000		1,000
PREFERRED:				

7. State the names and addresses of the officers specified below and of all the directors of the corporation, and the date on which the term of office of each expires:

OFFICERS	NAME	ADDRESS Number, Street, City or Town, State, Zip Code	EXPIRATION OF TERM
PRESIDENT	Oliver D Fernandez, Jr	60 Gerard Street Boston, MA	Next _____ Annual Meeting
TREASURER	same as above	same as above	
CLERK	same as above	same as above	
DIRECTORS	same as above	same as above	

I, the undersigned Oliver D. Fernandez, Jr, being the President of the above-named corporation, in compliance with the General Laws, Chapter 156B, hereby certify that the above information is true and correct as of the dates shown. IN WITNESS WHEREOF AND UNDER PENALTIES OF PERJURY, I hereto sign my name on this

6th day of October, 20 01

Signature: _____ Title: President

"C"

UNITED STATES DISTRICT COURT

District of Massachusetts

United States of America for the use of
V. Waltham Lime & Cement Company,

SUMMONS IN A CIVIL CASE

Plaintiff,

Peabody Construction Co., Inc.,
ODF Contracting Co., Inc.,
Hoon Companies, Inc. and
Travelers Casualty and Surety Company
of America,

CASE NUMBER: 05-10138 NG

05 10138 NG

Defendants

TO: (Name and address of Defendant)

ODF Contracting Co., Inc. and/or Oliver D. Hernandez
60 Gerard Street
Boston, MA 02119

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Anthony M. Moccia, Esquire
David B. Hobbie, Esquire
ECKERT SEAMANS CHERIN & MELLOTT, LLC
One International Place, 18th Floor
Boston, MA 02110

Telephone: 617-342-6800
Facsimile: 617-342-6899

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

CLERK

(By) DEPUTY CLERK



DATE

FEB - 3 2005

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE
NAME OF SERVER (PRINT)	TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the third-party defendant. Place where served: _____
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____
- ☐ Returned unexecuted: _____
- ☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
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DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ Date _____ Signature of Server _____

Address of Server



Suffolk County Sheriff's Department
Civil Process Division
Diligent Search



ANDREA J. CABRAL
SHERIFF

DOCKET NUMBER:

05002762

LAWRENCE W. McGRATH, ESQ.
CHIEF DEPUTY

ORIGINAL ADDRESS:

60 Gerard St
Boston

I WAS UNABLE TO SERVE DEFENDANT BECAUSE:

- ☐ NO STREET BY THIS NAME
- ☐ NO SUCH NUMBER ON GIVEN STREET
- ☐ DEFENDANT MOVED TO: _____
- ☐ DEFENDANT AWAY UNTIL _____
- ☐ OTHER: _____

I HAVE ATTEMPTED TO FIND AN ALTERNATIVE ADDRESS BY CHECKING THE FOLLOWING:

DATE COMPLETED

- | | |
|--|--------------------|
| <input type="checkbox"/> CALLED THE ATTORNEY FOR ALTERNATE ADDRESS | <u> / / </u> |
| <input type="checkbox"/> CHECKED THE REGISTRY OF MOTOR VEHICLE FILE | <u> / / </u> |
| <input type="checkbox"/> CHECKED FOR TELEPHONE LISTING | <u> / / </u> |
| <input type="checkbox"/> CHECKED COLES PUBLICATION | <u> / / </u> |
| <input type="checkbox"/> CHECKED IN COMPUTER/ELECTRONIC DATABASE | <u> / / </u> |
| <input checked="" type="checkbox"/> INTERVIEWED NEIGHBOR OR RELATIVE | <u>2,18,05</u> |

COMMENTS/NEW ADDRESS:

OUT of Business 18
months ago - per Security Guard

TRANSFERRED TO DEPUTY: _____

2,18,05

DEPUTY SHERIFF

617-989-6999 EXT _____

SUFFOLK ss

BOSTON

Feb 18, 2005

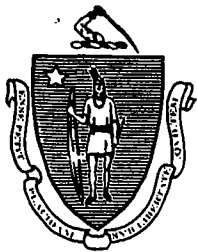
I this day made diligent search for the within named defendant corporation

ODF Contracting CO., Inc as within described

and for its officers, stockholders, agents or attorney but I have been unable to find either within my precinct known to me as such and duly accredited and therefore could make no service on this precept upon said defendant corporation.

Fees Expenses Incurred: \$ 15.00


Deputy Sheriff



PLEASE INDICATE INVOICE NUMBER OF YOUR REMITTANCE

Suffolk County Sheriff's Department

Civil Process Division

45 BROMFIELD STREET, 5TH FLOOR, BOSTON, MA 02108 — (617) 989-6999



ANDREA J. CABRAL

SHERIFF

David Hobbie
Eckert Seamans
One International Place
18th Floor
Boston, MA 02110-110-

LAWRENCE W. McGRATH, ESQ.

CHIEF DEPUTY

Phone:(617) 342-6800

Amount Due: \$ 15.00
Invoice #: 05002762
Invoice Date: 03/07/2005

PLEASE RETURN THIS TOP PORTION WITH YOUR PAYMENT

Payment Due Upon Receipt

Writ: Summons, Complaint and Cover Sheet and Catogory Sheet, Letter

Please send a copy of this invoice with your remittance

United States Of America For the use Of
vs.
ODF Contracting Co., Inc. and/or Oliver

Invoice #: 05002762
Invoice Date: 03/07/2005

Serve: ODF Contracting Co., Inc. and/or Oliver
60 Gerard Street
Boston, MA 02119

Served by Deputy Sheriff: Robert Foscaldo 32
Service Date: 02/18/2005 Time: 11:22AM
Method of Service: Diligent Search/Unable to Proceed

Charge

D/S In State
Total Charges

Amount

15.00
15.00

Payment DateCheck NumberAmount

Payment Total

Amount Due: \$ 15.00

"D"

UNITED STATES DISTRICT COURT

District of Massachusetts

United States of America for the use of
W. Waltham Lime & Cement Company,

Plaintiff,

Peabody Construction Co., Inc.,
ODF Contracting Co., Inc.,
Hoon Companies, Inc. and
Travelers Casualty and Surety Company
of America,

Defendants

SUMMONS IN A CIVIL CASE

CASE NUMBER:

05-10138 NG

05 10138 NG

TO: (Name and address of Defendant)

ODF Contracting Co., Inc. (c/o John Aquino, Bankruptcy Trustee for ODF Contracting)
60 Gerard Street
Boston, MA 02119

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Anthony M. Moccia, Esquire
David B. Hobbie, Esquire
ECKERT SEAMANS CHERIN & MELLOTT, LLC
One International Place, 18th Floor
Boston, MA 02110

Telephone: 617-342-6800

Facsimile: 617-342-6899

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.



CLERK

(By) DEPUTY CLERK

DATE

FEB 3 2005

RETURN OF SERVICE

DATE

NAME OF

Chec



Suffolk County Sheriff's Department • 45 Bromfield Street • Boston, MA 02108 • (617) 989-6999
Suffolk, ss.

March 7, 2005

I hereby certify and return that on 3/2/2005 at 3:40PM I served a true and attested copy of the Summons, Complaint and Cover Sheet and Letter, Catogory Sheet in this action in the following manner: To wit, by delivering in hand to J.Aquino, agent and person in charge at the time of service for ODF Contracting Co., Inc., at C/o John Aquino, Esquire, Trustee, 260 Franklin Street, Anderson & Aquinio, LLP Boston, MA 02108. U.S. District Court Fee (\$5.00), Basic Service Fee (IH) (\$30.00), Travel (\$1.00), Postage and Handling (\$3.00), Attest/Copies (\$10.00) Total Charges \$49.00

Deputy Sheriff John Cotter

Deputy Sheriff

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
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DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date

Signature of Server

Address of Server